No. 89-1332

In The

Supreme Court of the United States

October Term, 1989

GENE McNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., *Petitioners,*

v.

HAITIAN REFUGEE CENTER, INC. ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Counsel:
ROBERT A. WILLIAMS, ESQ.
FLORIDA RURAL LEGAL SERVICES, INC.
110 South Second Street
Immokalee, Florida 33934
(813) 657-3681

CHERYL A. E. LITTLE, ESQ.
HAITIAN REFUGEE CENTER, INC.
32 N.E. 54th Street
Miami, Florida 33137
(305) 757-8538

BRUCE J. WINICK, ESQ.
UNIVERSITY OF MIAMI SCHOOL OF LAW
P.O. Box 24807
Coral Gables, Florida 33124

Counsel of Record:

IRA J. KURZBAN, ESQ.
KURZBAN, KURZBAN & WEINGER, P.A.
Plaza 2650
2650 Southwest 27th Avenue
Miami, Florida 33133
(305) 444-0060

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the district courts are wholly precluded from asserting general federal question jurisdiction, 28 U.S.C. §1331 or general immigration jurisdiction for matters arising under Title II of the Immigration and Nationality Act, 8 U.S.C. §1329, by 8 U.S.C. §1160(e), where organizational as well as individual plaintiffs challenge the constitutionality of INS practices and policies that make meaningful individual review impossible.

TABLE OF CONTENTS

TABLE OF CONTINUED

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-17a), is reported at 872 F.2d 1555. The opinion and order of the District Court (Pet. App. 18a-54a, 55a, 57a), is reported at 694 F.Supp. 864.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1989. A petition for rehearing was denied on October 10, 1989 (Pet. App. 58a-59a). On January 3, 1990 Justice Kennedy extended the time within which to file a petition for writ of certiorari, up to and including February 17, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions stated in the Solicitor General's petition (8 U.S.C §§ 1105a, 1160), the fifth amendment to the United States Constitution and 8 U.S.C. §1329 are pertinent to this case and are set forth below:

U.S. Const., Amend, V:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law;. . . .

8 U.S.C. §1329:

> The district courts of the United States have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title. It shall be the duty of the United States Attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with the violation under section 275 or 276 may be apprehended. No suit or proceeding for a violation of any of the provisions of this title shall be settled, compromised, or discontinued without the consent of

the court in which it is pending and any such settlement, compromise or discontinuance shall be entered of record with the reasons therefor.

STATEMENT OF THE CASE

A. The Special Agricultural Worker Program

1. Legislative History and Eligibility Requirements.

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress required that the Attorney General grant residency under a Special Agricultural Worker ("SAW") program to alien farmworkers who performed seasonal agricultural services and who otherwise qualified under the Immigration and Nationality Act. 8 U.S.C. §1160 *et seq*. The dual purpose of this program was "to grant . . . residence to agricultural workers – to benefit the workers – and to guarantee growers an ample supply of nondomestic agricultural workers – to benefit the growers." 132 Cong. Rec. H8517 (daily ed. Sept. 26, 1986) (statement of Rep. Mazzoli). The Congress heard extensive testimony on the effects that employer sanctions would have in removing a substantial number of undocumented individuals from the agricultural workforce. The program was designed to respond to the growers' concerns regarding the availability of labor and "at the same time to protect workers to the fullest extent of all applicable federal, state and local laws . . . to provide workers with the option of switching jobs and to provide them with a status that insures that their employment is fully governed by all relevant law without exception." H.R. No. 682, 99th Cong., 2d Sess. 83-84 (1986).

Under the SAW program a farmworker was eligible to become a temporary resident if he or she (1) resided in the United States and performed seasonal agricultural services for at least ninety man-days during the twelve-month period ending on May 1, 1986, and (2) was admissible as an immigrant. 8 U.S.C. §1160(a)(1)(B). To be eligible for the program, the SAW applicant had to apply for adjustment of status to temporary residency during the eighteen month period beginning on June 1, 1987. 8 U.S.C. §1160(a)(1)(A). The

application period for this program, therefore, expired on November 30, 1988. SAW applicants granted temporary residency under the first phase of the program became eligible for lawful permanent residency on December 1, 1989 if they had performed agricultural services for ninety man-days during three consecutive years, or on December 1, 1990 if they performed agricultural services for only one ninety man-day period. 8 U.S.C. §1160(a)(2).

2. The Application Process

The application process for the SAW program began at a personal interview held at a legalization office ("LO"), a local office of the INS authorized to accept and process applications. 8 C.F.R. §210.1(h).[1] The interviewing office could deny the application, recommend that it be denied, or recommend that it be granted. Those applications that were not denied by interviewing officer were forwarded to a regional processing facility ("RPF") for adjudication. If a denial issued either from the LO or the RPF the applicant had to appeal the decision to the legalization appeals unit ("LAU") which makes the final administrative decision on SAW applications. Pet. App. 22a.

The interview process was central to the determination of SAW status. The immigration officer at the LO was asked to determine the credibility of the applicant and the documentation he or she presented regarding eligibility. 8 C.F.R. §§210.2(c)(4)(i) [the applicant must establish to the satisfaction of the examining officer during an interview that his or her claim to eligibility for special agricultural worker classification was credible . . .]; 210.3(b)(2) [the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility]. Moreover, the personal interview was of utmost importance because as the district court found, "farm labor contractors and other agricultural

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[1] Regulations to implement the SAW provisions are codified at 8 C.F.R. parts 103 and 210. 52 Fed. Reg. 16190 *et seq*. and 16195 *et seq*. (May 1, 1987).

employers often do not maintain accurate employment records. [T]his makes it difficult and, in many cases, impossible for a farmworker to produce formal documentation. Farmworkers are likely to be paid in cash by farm labor contractors whose lists of workers are often incomplete." Pet.App. 28a-29a.[2]

The interview is "the only face-to-face encounter between the applicant and the INS allowing the INS to assess the applicant's credibility." Pet.App. 28a. As the INS did not record or prepare a transcript of the interview, the only record created in the case was established on the INS officer's worksheet, Form I-696. Pet. App. 28a. The record created by the INS officer on the I-696 was of paramount importance because the appeal to the LAU was to "be based solely on the administrative record established at the time of the determination on the application" unless there was newly discovered evidence. 8 U.S.C. §1160(e)(2)(B).

Similarly, the judicial review of the administrative process is to "be based solely upon the administrative record established at the time of the review of the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. §1160(e)(3)(B). Thus, under petitioners' procedure after the personal interview at the LO, applicants had no other opportunity to present live testimony. The record on appeal is their "paper record", including the I-696 and written documentation, if any. This "record" then

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[2] In passing the SAW legislation Congress was aware of the documentation problem. Congress utilized the standards employed in the Fair Labor Standards Act and granted a presumption to SAW applicants recognizing that there may be "employee loss of records, destruction or falsification of records by employers, and other difficult circumstances where precise evidence of hours worked is lacking." Conference Report, Immigration Reform and Control Act of 1986, H.R. Conf. Ref. No. 1000, 99th Cong., 2d Sess., 97 (1986). The presumption in favor of applicants was formalized in IRCA. 8 U.S.C. §1160(b)(3)(B)(iii).

forms the "sole" basis for review by the RPF, the LAU and ultimately the circuit court. Pet. App. 7a, 28a; 8 U.S.C. §§ 1160(e)(2)(B), (e)(3)(B).[3]

B. The Proceedings Below

On June 13, 1988 this action was initiated on behalf of the Haitian Refugee Center, Inc. ("HRC") the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach ("MRS") and seventeen individuals whose applications for temporary residence under the SAW program had been denied by the Immigration and Naturalization Service. The legal action initiated by plaintiffs "d[id] not challenge any individual determination of any application for SAW status, but rather attack[ed] the manner in which the entire program [was] being implemented, allegations beyond the scope of administrative review." Pet. App. 37a-38a. Similarly, the organizational Plaintiffs HRC and MRS did not seek review of any individual claim. HRC alleged that defendants' actions "directly injures the organization because it makes HRC's work of assisting the Haitian refugee community more difficult and results in the diversion of HRC's limited resources away from members and clients having other urgent needs." Pet. App. 41. MRS similarly alleged "that the Defendants' behavior has discouraged otherwise eligible SAW applicants from seeking counseling and/or filing their claims and MRS is prevented from fulfilling its basic mission of assisting aliens to qualify under IRCA." Pet. App. 41a. As the district court found, HRS and MRS had injury separate and apart from the injury to the Plaintiffs in that they "have concrete programmatic concerns that form an adequate basis for alleging an injury in fact. . . ." Pet. App. 43a.

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[3] The applicant for SAW statutes has no opportunity to reopen the proceedings once the "record" is established on the I-696 by the legalization officer. 8 C.F.R. §103.5 ("motions to reopen a proceeding or reconsider a decision under part 210 . . . of this chapter shall not be considered").

The Plaintiffs' actions sought declaratory, mandatory and injunctive relief for themselves and a class of persons who have applied or will apply for SAW status. The complaint challenged "unlawful practices and policies" of the INS that "imposed an interview procedure which violates the applicants' fifth amendment right to due process by failing to provide interpreters, failing to allow the applicants to rebut adverse evidence, and refusing to allow the applicants to present witnesses on their own behalf." Pet. App. 19a-20a.[4]

The evidence at trial indicated that the denial rate for SAW applicants filed in the State of Florida was approximately twenty-nine percent, almost six times the denial rate for applications filed for amnesty under Section 245A of IRCA. Pet. Ap. 27a at n.9.

On the three issues that the government sought appeal, the court of appeals found that "in enacting the Special Agricultural Worker program, Congress and the Executive Branch have granted aliens a constitutionally protected right to apply for temporary residency as well as a right to substantiate their claims for eligibility." Pet. App. 14a. Despite the constitutionally protected interest and the importance of the interview process, INS did not record or prepare a transcript of the interview. Pet. App. 7a, 28a. The only record of the interview that was used for an appeal was the INS officer's

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[4] The plaintiffs also brought other challenges to INS' policies and practices including the petitioners' reliance on an impermissible standard of proof. As the petitioners acknowledge, they "did not challenge those paragraphs of the preliminary injunction on appeal." Petitioners' Brief at 7 n.5. Notwithstanding petitioners' claim that they continue to appeal the jurisdictional issue with respect to the first five paragraphs of the lower court's injunction, their brief to the Court of Appeals sought appeal only as to issues relating to the interview process. Appellants' Opening Brief at p. 16 n.3. ("Defendants/Appellants have advised Plaintiffs . . . that INS would fully comply with the terms of paragraphs one through five of the injunction which will eventually render moot the first through fifth claims of the complaint"). Indeed, the INS did seek to render these issues moot on August 26, 1988 by issuing a cable requiring the legalization offices in the Eleventh Circuit to utilize new procedures.

worksheet (I-696). The worksheets, however, often contained "very little information about the interview" and in some cases "were completely blank." Pet. App. 8a. As the court of appeals noted, "without any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a. The injunctive relief sought and obtained merely required INS interviewers "to particularize the evidence offered, testimony taken, credibility determinations and any other relevant information on the form I-696" so that a record for review would be available. Pet. App. 57a.

The evidence at trial also revealed that the record of interview "neither identified the name of the interpreter nor indicate[d] whether an interpreter was used." Pet. App. 9a, 27a-28a. Although ninety percent of the applicants at the legalization office spoke either Spanish or Haitian Creole, the INS did not provide interpreters at SAW interviews and did not investigate the qualifications of interpreters provided by the applicants. Pet. App. 9a. At the interview, applicants were expected to defend their application with "interviewers who did not speak their language and were not schooled in their culture." Pet. App. 51a. Under those circumstances, the district court noted that "it is difficult to find that the above circumstances constituted a 'meaningful' opportunity to be heard." Pet. App. 51a.

The third aspect of the Plaintiffs' claim regarded the ability to present witnesses at the LO. Although INS' treatment of the applications "enhances the importance of live witnesses to the application process" the evidence at trial indicated that despite the INS' policy to permit testimony of witnesses, "applicants had been prevented from presenting witnesses . . . [and] some LOs disallowed witness testimony as a general rule." Pet. App. 8a-9a.

The court of appeals affirmed the preliminary injunction of the district court. The court of appeals recognized that "Appellees do not challenge the merits of any individual status determination;" rather, "they contend that Defendants' policies and practices in processing SAW applications deprived them of their statutory and constitutional rights." Pet. App. 11a. The court of appeals specifically noted that "the

individual Plaintiffs here do not seek substantive review of any individual ruling respecting their status, rather, they challenge the adequacy of the procedures employed in the processing of their SAW applications." Pet. App.12a.

In affirming the district court, the court of appeals held that Section 210 of the INA did not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials and that to deprive review "would foster the very delay and procedural redundancy that Congress sought to eliminate." Pet. App. 11a. The court also rejected the government's argument that the Plaintiffs had to exhaust their administrative remedies, finding that "the chances are remote that the INS would have considered substantial revision of the procedures devised for the processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application." Pet. App. 13a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals that the district court was not wholly precluded from reviewing allegations of systematic abuses by INS officials which denied Plaintiffs and their class their constitutional right to due process does not raise significant questions meriting review on certiorari. The decision below is fully consistent with the plain meaning of the statute and prior decisions of this Court.

The decision below creates no significant conflict with the decision of any other court of appeals. Furthermore, in view of the fact that the Ninth Circuit has four similar cases pending before it which, when resolved, will either present a square conflict with the recent decision of the District of Columbia Circuit in *Ayuda v. Thornburgh*, 880 F.2d 135 (1989), or will further illuminate the question of the district courts' jurisdiction to hear challenges to the policies and practices of the INS in administering IRCA, review of this case is premature, and the Court should deny certiorari on the instant petition until the issue can percolate further in the lower courts.

This case has no national significance since the Special Agricultural Worker Program is a one-time-only program whose application period ended on November 30, 1988. Moreover, matters contained in the most important parts of the district court's order are the subject of a settlement agreement under which the petitioners have agreed to provide SAW applicants outside of the Eleventh Circuit with many of the procedural protections contained in the preliminary injunction at issue here.

Finally, resolving the question presented on certiorari will be of little practical significance in either this or any other case. Since the petitioners are not contesting the merits of the court of appeals' decision in affirming paragraphs (6), (7), and (8) of the preliminary injunction, the only question raised by petitioners is whether the district court was precluded from exercising its general federal question jurisdiction by 8 U.S.C. §1160(e). Because respondents' complaint also alleged jurisdiction pursuant to 8 U.S.C. §1329, resolution of the question presented would not dispose of the underlying controversy, nor is it likely to resolve other IRCA-related litigation, currently pending against the INS, since many of those cases, including the cases pending before the Ninth Circuit, also allege alternative jurisdictional grounds.

I. THE DECISION OF THE ELEVENTH CIRCUIT IS FULLY CONSISTENT WITH THE PLAIN MEANING OF §1160(e), THE PRIOR DECISIONS OF THIS COURT, AND THE LEGISLATIVE HISTORY OF IRCA

A. The Plain Language of §1160(e) Precludes Review of Petitioners' Argument that the District Court Lacks Jurisdiction to Review Any Aspect of the SAW Program

Petitioners' whole case rests on their claim that Congress meant to channel all judicial review of any aspect of the SAW program to the court of appeals in the review of a deportation order. IRCA provides that "[t]here shall be no administrative review or judicial review of a determination respecting an application for adjustment of status under this section except

in accordance with this subsection." 8 U.S.C. §1160(e)(1). The subsection requires the establishment of "a single level of administrative appellate review," and provides that "[t]here shall be judicial review of such a denial [of a SAW application] only in the judicial review of an order of deportation under [§106 of the INA]." 8 U.S.C. §1160(e)(2)(A) and (e)(3)(A). Section 106 of the INA provides that a deportation order be reviewed only in the court of appeals. Respondents obviously are not challenging any deportation orders; rather they brought this action in district court to challenge an officially approved program, pattern or scheme of defendants which deprived them of their statutory and constitutional rights. Because the present action simply does not seek "judicial review of a determination respecting an application for adjustment of status", §1160(e) on its face does not apply to this suit.

1. A Constitutional Challenge to Systematic Abuse By INS Officials Does Not Constitute A Review of a Determination Respecting an Application for SAW Status Under §1160(e)

Congress did not say that "any *claim arising* under the SAW program" nor that "any *action taken or decision made*" with respect to the SAW program must be reviewed only in the court of appeals. Rather, the limitation provision of §1160(e) is addressed only to "*a determination* respecting *an application*." 8 U.S.C. §1160(e) (emphasis added). While decisions by local immigration officials in charge of the SAW program not to afford applicants within their jurisdiction the opportunity to present witnesses or not to require competent translation at the interview stage may affect thousands of individual applicants, such a course of conduct is tantamount to "a determination respecting an application" only under a strained and far-fetched interpretation of the statute.

Certainly, Congress did not envision that the Legalization Appeals Unit of the INS ("LAU") would hear constitutional challenges to INS conduct. Just as obviously, respondents

could not have raised their constitutional claims before the LAU because the LAU may only hear cases involving challenges to individual applications for adjustment and must base its review solely on the administrative record established at the time of the determination on the application. 8 U.S.C. §1160(e)(2)(B). The factors to be considered in assessing the constitutionality of the procedures employed – the private interest at stake, the risk of erroneous deprivation and the probable value of additional safeguards, and the fiscal and administrative burdens that the additional procedures would entail – are simply outside the scope of administrative review. Moreover, as the court of appeals found, "the chances are remote that the INS would have considered substantial review of the procedures devised for processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application." Pet. App. 13a. *Cf. Mathews v. Eldridge*, 424 U.S. 319 at 330 (1976).[5]

There is a similar limitation on review before the court of appeals since 8 U.S.C. §1160(e)(3)(B) provides that "judicial review shall be based solely upon the administrative record established at the time of review by the appellate authority . . . " The court of appeals, therefore, could not review a record which did not exist.

Furthermore, respondents' claims could not be raised in the court of appeals in the review of a deportation order since the petitioners have failed to provide for an administrative procedure which would vest exclusive jurisdiction in the court of appeals. This Court has held that only determinations made during and incident to the administrative proceedings conducted by the immigration judge and reviewable by the Board of Immigration Appeals may be reviewed as part of a final order of deportation. *Foti v. INS*, 375 U.S. 217 (1963). Final

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[5] In fact, a review of the decisions of the LAU prior to this action being filed does not reveal a single instance in which an individual determination was reversed because of inadequate translation, or the failure to make an adequate record of the interview, or because the applicant was denied his right to present witnesses at the interview.

orders of deportation thus include discretionary determination made by the Attorney General relating, for example, to the suspension or withholding of deportation, if such determinations are made in the course of a deportation proceeding, *Id.* Conversely, determinations not made in the course of a deportation proceeding are not within the exclusive ambit of the court of appeals. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 211-216.[6]

Under the petitioners' administrative scheme neither the Immigration Judge nor the Board of Immigration Appeals may reopen or review the decision of the Legalization Appeals Unit with respect to a SAW application. 8 C.F.R. §103.3(a)(2)(iii).[7] Thus, a determination on a SAW application will never become part of a final order of deportation and, following the reasoning of *Cheng Fan Kwok*, will not be reviewable under §106(a) of the INA.[8]

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[6] *See also Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978) (asylum decisions by district directors may not be reviewed by courts of appeals under INA §106); *Che-Li Shen v. INS*, 749 F.2d 1469, 1472 (10th Cir. 1984) (application for adjustment of status not reviewable under INA §106 unless denial was part of deportation proceeding).

[7] 8 C.F.R. §103.3(a)(2)(iii) bars the immigration judge from considering any issue related to the denial of a SAW application:

> "No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings."

[8] This is certainly not the result intended by Congress; the fault is not, however, in the statutory scheme but in the manner in which petitioners have implemented administrative review of SAW applications. Nothing in the statute required that the administrative appeal be to the Administrative Appeals Unit. The "single level of administrative appellate review" provided for in 8 U.S.C. §1160(e)(2) could just as easily have been the Board of Immigration Appeals as the LAU. Had petitioners assigned the administrative appellate function to the BIA, then there would be no question that exclusive review of denials of individual applications was vested with the court of appeals.

Petitioners' strained interpretation of 8 U.S.C. §1160(e) is totally at odds with this Court's approach to construing statutory limitations on judicial review adopted in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). In *Michigan Academy*, an organization of family physicians and several individual physicians filed suit in district court challenging a Health and Human Services Department regulation authorizing the payment of Medicare Part B benefits in different amounts for similar physicians' services. The government made exactly the same type of argument as petitioners here, contending that the Medicare Act impliedly foreclosed judicial review of any action taken under Part B because it failed to authorize such review while simultaneously authorizing judicial review of "any determination . . . as to . . . the amount of benefits under Part A."

This Court rejected the government's arguments, holding that the district court had jurisdiction over the plaintiffs' challenge to the reimbursement regulation. The Court reasoned that the provisions detailing how and in what forum an individual can obtain review of a determination as to the amount of benefits "simply [do] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original). The Court distinguished *Heckler v. Ringer*, 466 U.S. 602 (1984), a case heavily relied upon by petitioners here, as a case seeking review of an amount determination. *Id.* at 677-78 n.7.[9]

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[9] The distinction between *Heckler v. Ringer* and the present case is obvious. *Ringer* presents a very different fact situation and arises under a very different statute from IRCA. In *Ringer*, the Court held that Ringer's cause of action – namely that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act – constituted "a claim arising under" the Medicare Act within the meaning of the judicial preclusion provision. 466 U.S. at 621. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under the Act." Far from providing an analogy for how IRCA should be construed, the broad

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2. Section 1160(e) Does Not Proscribe Challenges to INS Conduct By Organizational Plaintiffs

Michigan Academy also makes clear that even if applicants for SAW status are required to follow the narrow statutory path of limited administrative and judicial review of individual determinations in their cases, such judicial preclusion provisions cannot bar organizations such as HRC and MRS who (like the Michigan Academy of Physicians) will never have claims capable of being processed through the standard review procedure.[10]

While essentially conceding that HRC and MRS meet the test for organizational standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), petitioners argue that the absence of a specific provision in IRCA giving such organizations judicial recourse impliedly precludes their claims. The evidence of Congressional intent to preclude judicial review by organizations is not only not "fairly discernable in the statutory scheme," it is nonexistent. *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984). While petitioners claim that a suggestion of Congressional intent can be found

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terminology employed in 42 U.S.C. §405(h), expressly providing that no action shall be brought under sections 1331 or 1346 of Title 28 to recover on any claim arising under [subchapter A] of the Medicare Act, illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

[10] *Michigan Academy* was originally remanded to the lower court for further reconsideration in light of *Heckler v. Ringer*, 466 U.S. 602 (1984). 469 U.S. 807 (1984). On remand, the court of appeals specifically addressed the question of whether the Michigan Academy of Physicians, a non-profit corporation, was *entitled to* challenge a Medicare regulation in district court *since* §405(g) administrative review was not available to it, as it was to individual claimants. The court of appeals concluded that *Ringer* did not proscribe challenges to the Medicare Act where the challenge was made by a party other than a claimant for benefits. *Michigan Academy of Family Physicians v. Blue Cross and Blue Shield of Michigan*, 757 F.2d 91, 94 (6th Cir. 1985). The decision was subsequently affirmed by this Court. 476 U.S. 667, 669 (1986).

in the absence of specific provision in IRCA giving organizational plaintiffs standing, there is nothing in the statutory scheme here which is significantly different from the Medicare Act discussed in the *Michigan Academy* case or a hundred other statutes in which organizational standing has been upheld.

Petitioners' contention that the claims of the organizational plaintiffs simply duplicate the claims of applicants is simply not true. The goal of offering capable, informed assistance to Haitian refugees to which, the district court found, HRC and MRS's very existence is devoted, is quite distinct from an applicant's desire to successfully obtain legal status. MRS is a "qualified designated entity" ("QDE"), specifically authorized under IRCA to assist in the preparation and submission of SAW applications. 8 U.S.C. §1160(b)(1)(A), §1160(b)(2); §1255a(c)(1), (c)(2).[11] Both HRC and MRS are discrete legal entities from the aliens they represent and therefore suffer significantly different types of harm as the result of conduct challenged here: not only is their ability to perform their core functions impaired and their credibility in the community they served damaged, but in the case of the QDEs, such as MRS, there is direct financial injury as well.

Having created the special role of the QDEs, it is hardly conceivable that Congress would have prevented them from seeking judicially-mandated relief to protect that role.

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[11] Congress recognized that potential applicants for legalization were members of a "fearful and clearly exploitable" "subclass" within American society, S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985), naturally wary of governmental authority. H. Rep. No. 682, 99th Cong., 2d Sess. 49 (1986). In order to garner a high participation rate in an atmosphere of trust and understanding, *id.* at 73, Congress established QDEs to reach out to the illegal alien community, to encourage and assist them in applying for legalization, 8 U.S.C. §1255a(c)(2). *See* S. Rep. No. 132 at 47, QDEs are required by statute, to act as intermediaries between the INS and the alien community, to counsel applicants, disseminate information about the program and to screen and process applications. *See* 8 U.S.C. §1255a(c)(1)-(4).

3. Insofar as the District Court Only Ordered Prospective Relief, Respondents' Claims Cannot Be Properly Characterized "As Seeking Review of 'A Determination Respecting an Application' for SAW Status."

While petitioners argue throughout their petition that the fact that the district court required the INS to vacate some notices of denial and reconsider the applications under the proper procedures "makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of the INS's denials of SAW applications in particular cases", paradoxically petitioners have chosen not to appeal those provisions of the preliminary injunction which required the reopening of many cases.[12] Instead, the only provisions of the district court's order at issue here are paragraphs (6), (7) and (8) which are wholly prospective in nature and thus could not possibly have effected any prior determination respecting a SAW application.

Paragraph (6) required that the Legalization Offices maintain competent translators. Clearly the interview mandated by the INS regulations is meaningless unless the applicant and the interviewer understand each other, and petitioners acknowledged in their brief in the court of appeals that "it is a requirement of the program that an interpreter be used in every case where the applicant does not understand the adjudicator." Appellants' Opening Brief at 11. Similarly the right to present witnesses at the interview mandated by paragraph (7) was clearly contemplated by the INS regulations, and again petitioner admitted below that "the general rule followed by the INS is that SAW applicants can bring witnesses to testify on their behalf." Appellants' Opening Brief at 11.

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[12] Petitioners advised plaintiffs and the district court that the INS would fully comply with the terms of paragraphs 1 through 5 of the injunction which will eventually render moot the First through Fifth Claims of the Complaint. Appellants' Opening Brief at 16. Not only did petitioners acquiesce in the relief ordered in paragraphs (1) through (4) of the preliminary injunction, they subsequently voluntarily extended those provisions to cover all 13 states in the INS Southern Region.

Paragraph (8) of the injunction directs the INS interviewers to "particularize the evidence offered, testimony taken, credibility determinations and any of the relevant information on the form I-696 interview sheet. As the court of appeals noted "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. at 16a.

The importance of these basic procedures to the proper adjudication of SAW applications is obvious, and petitioners do not challenge that aspect of the judgment here.[13] It is equally obvious that the implementation of these procedures prospectively neither reverses a denial of a SAW application nor dictates the outcome of a particular case.

B. There Was No Legislative Intent to Preclude Constitutional Challenges to INS Conduct in Administering the SAW Program.

Petitioners contend there is no evidence that Congress intended the district courts to entertain constitutional

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[13] *See* p. 11 fn.7, Petitioners' Brief where petitioners explain their decision not to seek review of the holdings on the merits. Respondents would take issue with petitioners' further statement that the court of appeals misapplied the multifactor analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), because it did not give consideration to the government interest "in retaining the current procedures," and that it "overrated the risk of error in the 'generality of cases'." In the first place, the court of appeals specifically found it unnecessary to consider the third *Mathews* factor because the INS procedures already contemplated what the provisions of the injunction require, a point conceded by petitioners themselves, as noted above. Pet. App. 16a. Second, petitioners' use of statistics to prove that the procedures were unnecessary is disingenuous at best. While it is true that over 90% of the SAW applications thus far adjudicated nationwide have been approved, that proves little, because as of January 9, 1990, approximately 53% of the SAW applications filed remained unadjudicated. A far better measure of the risk of error can be obtained from an examination of the 20,278 cases reopened within the Eleventh Circuit pursuant to the preliminary injunction; to date more than 57% of these cases have been reversed upon readjudication under the proper procedures.

challenges to INS conduct in administering the SAW program. However, the real question is not whether there is evidence that Congress specifically authorized review of agency action, since under this Court's holding in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967) such reviewability is to be presumed, but whether there exists clear and convincing evidence of a contrary intent. Evidence regarding intent to restrict reviewability must consist of " 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is fairly discernable in the detail of the legislative scheme." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 673 (1986). *Accord, Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988).

Petitioners essentially proffer only one argument based on IRCA's legislative history. They contend that since the Senate abandoned a strict Senate provision precluding all judicial review of all aspects of the legalization program, by class action or otherwise, and acceded to the House provision which specifically provided for limited judicial review of denials of SAW applications, Congress could not have intended to open the door to the kind of action brought here. As a general matter, this Court has held that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories, supra* at 141. Here, the evidence clearly points the other way; Congress specifically rejected a broadly worded provision which clearly would have barred the present suit for a much narrower one.[14] "Few principles of statutory construction are

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[14] The bill in question, S. 1200, did not even contain a SAW program. S. 1200 would have established a general legalization program and explicitly provided that "there shall be no judicial review (by class action or otherwise) of a decision or determination under this section" and further provided that an alien denied adjustment of status under this

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more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1218-19 (1987).

The language and legislative history of IRCA indicate that what Congress really intended in enacting §1160(e) was to foreclose aliens from flooding the courts to seek premature review of applications – *i.e.*, review of the INS' determination of the facts of each case and its application of the law to those facts before deportation hearings were concluded. The exercise of jurisdiction over this case is in no way inconsistent with that goal.[15]

Both the district court and court of appeals recognized that the government's argument that §1160(e) precludes a federal district court from exercising general federal question

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legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien. . . ." S. 1200, 99th Cong., 2d Sess., §202(f)(1985). H.R. 3810 did provide for a SAW program and as passed by the House contained what is now 8 U.S.C. §1160(e). The Conference substitute adopted the House provision including the provisions with respect to judicial review. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 96 (1986).

[15] Sections 1160(e)(2)(B) and (e)(3)(B) require that both administrative and judicial review of a SAW determination "be based solely upon the administrative record . . . " However, as the court of appeals correctly noted, "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a, *citing Kent v. United States*, 383 U.S. 541, 561 (1966) ("Meaningful review requires that the reviewing court should review.") Where an agency's factfinding procedures are inadequate, leading to a deficient record, courts may be forced to undertake *de novo* review. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 412, 415 (1971). Thus, postponing judicial resolution of plaintiffs' claims until individual SAW applicants have been placed in deportation proceedings and exhausted their appeals to the BIA, would foster the very delay and procedural redundancy that Congress sought to eliminate in passing §1160(e).

jurisdiction over an action alleging a pattern or practice of procedural due process violations by INS in its administration of the SAW program is essentially the same argument which the INS has made with respect to 8 U.S.C. §1105(a) and which has been rejected by three circuit courts. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1989) (en banc), *aff'd*, 474 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986).[16]

Petitioners seek to distinguish these cases by claiming that in IRCA, Congress employed language even broader than that in Section 1105a, "expressly limiting review of all claims 'respecting an application' under the SAW program to petition for review of an order of deportation." Petitioners' Brief, p. 25. Of course, Congress did not use the words "all claims" and only limited review of "a *determination* respecting an application." Nor does 1160(e) go farther than Section 1105a "by adding an explicit prohibition on any other form of judicial review." Section 1105a explicitly provides that its procedure "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation."

Thus, while admittedly not controlling, the logic of cases, like *HRC v. Smith* and *Jean v. Nelson* is directly analogous to the issue presented here. However, perhaps the true significance of these cases to the present inquiry is that Congress created IRCA's judicial review provisions against a well-established background of case law holding that 8 U.S.C.

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[16] *See also NCIR, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vacated on other grounds*, 107 S.Ct. 1881 (1987) (8 U.S.C. §1252(a) does not bar district court jurisdiction where no review of any individual bond determination is sought); *International Union of Bricklayers v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985) (doctrine of non-reviewability of consular decisions is not applicable where plaintiffs do not challenge a particular decision in a particular case of matters which Congress has left to executive discretion but challenge the underlying procedures.)

§1105a does not preclude broad-based regulatory challenges. When adopting a new law incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782, n.15 (1985),[17] and to adopt that interpretation when it incorporates the prior law without change. *Id.*[18]

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[17] *See also Lorillard v. Pons*, 434 U.S. 575, 580-581, (1978); *Bob Jones University v. United States*, 461 U.S. 574, 601-602 (1983); *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982).

[18] Moreover, there is direct evidence of Congressional knowledge and endorsement of the "pattern and practice" exception to §1105a. In 1983, when the Senate was debating judicial review of asylum applications as part of an immigration reform bill, the following colloquy occured regarding a provision which would make the provisions of chapter 158 of title 28 the sole and exclusive procedure for the judicial review of final orders of exclusion or deportation notwithstanding 8 U.S.C. §1329 and 28 U.S.C. §1331:

> MR. BIDEN: [W]ith regard to section 123(a)(2), my understanding is that the language in that section is intended to make clear that it establishes the sole basis for reviewing final orders of deportation or exclusion. There is no intention to overturn any cases provided for judicial review, other than final orders, in matters of pattern and practice when that is appropriate or in the following cases:
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> Haitian Refugee Center v. Smith, 676 F.2d 103 (5th Cir. 1983).
>
> Louis v. Nelson, No. 82-5772 (11th Cir. dec. Apr. 12, 1983).
>
> Orantes-Hernanez v. Smith, 541 F.Supp. 351 C.D. Ca. 182.
>
> Is my understanding correct?
>
> MR. SIMPSON: Yes, Mr. President. The reference to section 279 of the Act and to section 1331 of title 28 is simply to make clear that they do not provide a basis for district court review of final orders.

129 Cong. Rec. at S12857 (May 18, 1983).

Ironically, petitioners seek to distinguish *UAW v. Brock*, 477 U.S. 274 (1986) in which this Court held that the judicial review provisions of the Trade Act of 1974 regarding trade readjustment allowance benefits did not bar a union's federal district court challenge to a Trade Act regulation relating to these benefits, on the grounds that the statue considered there was passed against a backdrop of prior court decisions recognizing the availability of review under similar statutory schemes. Petitioners simply ignore the fact that a similar contemporary legal context existed when Congress passed IRCA.

The very fact that Congress implemented judicial review of legalization denials through the pre-existing statutory structure of 8 U.S.C. §1105a – without further restriction of or change to that section – establishes that Congress did not seek to alter legislatively the case law on §1105a with respect to IRCA.

II. THERE IS NO CLEAR AND SUBSTANTIAL CONFLICT BETWEEN THE D.C. AND ELEVENTH CIRCUITS OVER THE QUESTION OF WHETHER THE DISTRICT COURTS ARE WHOLLY PRECLUDED BY §1160(e) FROM HEARING CONSTITUTIONAL CHALLENGES TO INS POLICIES AND PRACTICES WHICH DENY APPLICANTS A MEANINGFUL OPPORTUNITY TO BE HEARD.

There is no clear and substantial conflict with the decision of the United States Court of Appeals for the District of Columbia in *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989). In *Ayuda*, a number of organizations and five individual plaintiffs challenged the INS' interpretation of the "known to Government" provision of 8 U.S.C. §1255a(a)(2)(B). 8 U.S.C. §1255a(a)(2)(B) provides that applicants for IRCA's legalization program who are "nonimmigrants" (*i.e.*, persons who entered the United States lawfully prior to 1982 for a temporary period) must have violated restrictions on their nonimmigrant status as of January 1, 1982, and must establish that their resultant "unlawful status was known to the Government as of [January 1, 1982]."

In May 1987, the INS issued regulations that narrowly defined "known to the Government" to require the alien's presence to have been known to the INS prior to January 1, 1982. 52 Fed. Reg. 16206 (1987); 8 C.F.R. §245a.1(d) (1987). The district court in *Ayuda v. Meese*, 687 F.Supp. at 661-63 rejected the INS's definition of the phrase "known to the Government" as violative of the clear statutory language and declared the INS's regulation to be contrary to law. *Id.* at 666. Subsequently, a panel of the D.C. Circuit in a 2-1 decision, found that the judicial review provisions of the legalization program at 8 U.S.C. §1255a(f) precluded district court review. The majority also held in the alternative that the part of the policy challenged was not ripe for review.

The most obvious distinction between the *Ayuda* case and this one is that the SAW program and general legalization programs contained in the IRCA have differing purposes and the provisions governing judicial review, while essentially the same, are set forth in separate sections of IRCA.[19] At least technically there is no conflict between the two circuits since the two distinct statutory provisions are involved.

A much more significant distinction exists, however. The *Ayuda* case is essentially an APA challenge to a INS-promulgated regulation on statutory grounds, whereas the issue presented here is whether the INS's practice and policies in administering the SAW program violated the Fifth Amendment right to due process.[20] The difference goes directly to

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[19] The two provisions differ in that 8 U.S.C. §1160(e) does not specifically preclude judicial review of late filings and authorizes judicial review of SAW denials in the context of review of orders of exclusion, as well as orders of deportation.

[20] While the complaint in *Ayuda* asserted a constitutional claim – that the regulation, and the INS's policies and practices pursuant to that regulation violated due process, the district court in *Ayuda* did not reach the issue of whether the regulation and the practices and procedures of the INS violated the Constitution. Nor did the D.C. Circuit address the constitutional claim. By contrast, the Court of Appeals for the Eleventh Circuit held that SAW applicants must be accorded the protections of due

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the showing that must be made by the government to overcome the presumption in favor of judicial review. As this Court emphasized in *Johnson v. Robison*, 415 U.S. 361 (1974) "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373-374. *See also Weinberger v. Salfi*, 422 U.S. 749 (1975). In cases such as this one involving constitutional claims, the showing that must normally be made to overcome the presumption in favor of review is heightened "in part to avoid the serious constitutional question" that would arise if a federal statute were to deny any judicial forum for a colorable constitutional claim. *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988), citing *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 681 n.12 (1986).

Another important difference between *Ayuda* and this case is that whereas the *Ayuda* plaintiffs challenged an INS regulation as violative of the statutory language and purpose of the IRCA, here plaintiffs were basically challenging the INS's failure to follow its *own regulations and procedures*. Thus, the court of appeals specifically found that the relief ordered by the district court required "no more than is required by IRCA, its accompanying regulations and INS procedures." Pet. App. 15a-16a. Quite apart from the constitutional violations, the district court properly exercised its jurisdiction under 8 U.S.C. §1329 by ordering the INS to adhere to its own regulations and procedures. *See HRC v. Smith*, 676 F.2d 1023, 1041, fn. 48 (5th Cir. 1982), *citing United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).[21]

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process and that under the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Landon v. Plasencia*, 459 U.S. 21 (1982) the district court did not abuse its discretion in granting the preliminary injunction, a holding that petitioners do not challenge here.

[21] These differences are highlighted by the courts' treatment of the parties to the litigation. As the *Ayuda* case focused on the proper interpretation of the phrase "known to the Government" once the district

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Even if one were to accept petitioners' view that the decision below is in conflict with the decision in *Ayuda, Inc. v. Thornburgh*, the impact of whatever conflict exists is narrowly confined and not likely to have continuing future consequences since, as petitioners acknowledge, both the legalization program and the SAW programs "have largely concluded their first phase." Moreover, the issue is simply premature for this Court's review, since a number of other cases presently pending before the Court of Appeals for the Ninth Circuit may present a square conflict with the result in *Ayuda* and in any case, will more thoroughly delineate the nature of the problem.[22]

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court found that the organizational plaintiffs had standing, there was no need for the district court to address the question whether the individual plaintiffs had standing. Although the individual plaintiffs moved for class certification the district court did not act on the motion, and no class has been certified. Here, by contrast, the district court and court of appeals recognized the standing of the individual plaintiffs to challenge the adequacy of the procedures employed in the processing of their SAW applications, and the district court certified a class of all SAW applicants within the Eleventh Circuit who have been or will be denied SAW status by the INS because of the defendants' unlawful practices and policies.

[22] The cases before the Ninth Circuit are *Catholic Social Services v. Thornburgh*, No. S-86-1343-LKK (E.D. Cal. June 10, 1988), appeal pending, Nos. 88-15046, 88-15127, 88-15128 (9th Cir. argued Nov. 18, 1988); *LULAC v. INS*, No. 87-4757-WDK (C.D. Cal. 1988), appeal pending, No. 88-6447 (9th Cir.); *Immigrant Assistance Project v. INS*, 709 F.Supp. 998 (W.D. Wash. 1989), appeal pending, Nos. 89-35345, 89-35593 (9th Cir.); *Zambrano v. Thornburgh*, No. 5-88-455 EJG (E.D. Cal. August 9, 1988), appeal pending, Nos. 88-15438, 88-15533 (9th Cir.). In each of these cases, the government has raised the same issue present in the *Ayuda* case – whether 8 U.S.C. §1255a(f) precludes the federal district courts from exercising general federal question jurisdiction over challenges to INS rules and policies.

The Ninth Circuit has referred the jurisdictional issue in the *LULAC*, and *Zambrano* to the panel in *Catholic Social Services v. Thornburgh*, where the case has already been argued.

Since these cases if affirmed by the Ninth Circuit would present a square conflict with the holding in the *Ayuda* case, respondents urge the Court to deny the present petition.

III. THIS CASE HAS NO PRACTICAL SIGNIFICANCE SINCE GRANTING REVIEW IS UNLIKELY TO AFFECT THE OUTCOME OF A SINGLE SAW APPLICATION OR RESOLVE CASES PENDING IN OTHER CIRCUITS

A. This Case May Become Moot Before It Can Be Decided

Contrary to the government's position, the resolution of the jurisdictional issue would be of very limited, if any, practical significance. The last date for filing an application for adjustment under the SAW program was November 30, 1988. One group of SAWS (those who worked 90 man-days in each of the three years ending on May 5, 1984, 1985 and 1986) are already eligible for automatic adjustment to permanent resident status. The portions of the district court's order which the government has appealed require the government to afford applicants certain protections at the *interview* stage of the legalization process, measures which the government does not contest here. Those interviews have largely been completed.[23] In fact, by the time this Court could consider this case, it is quite possible that the case will be moot as to the issues raised by paragraphs (6), (7) and (8) of the preliminary injunction.[24] Thus, rather than affecting tens of thousands of

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[23] On May 17, 1989, Commissioner Nelson of the INS stated that the Service had projected that *all* interviewing of SAW applicants would be completed by June 30, 1989, with final processing finished by December 31, 1989. Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 400, 403 (1989) (statement of Alan C. Nelson, INS Commissioner).

[24] Respondents have been informed by petitioners that they are extending the protections of paragraphs (6)(7) and (8) to those individuals

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applications as is suggested by the government, it is very likely that the outcome of this case will not affect any of the determinations made on SAW applications within the Eleventh Circuit.

Nor is the outcome of this case likely to have great practical significance in terms of the administration of the SAW program outside of the Eleventh Circuit. About 70% of the SAW applicants reside in the INS Western and Northern Regions. These applicants are covered by a settlement agreement entered into by petitioners in a class action suit similar to this one. Under the terms of the settlement in *United Farm Workers of America (AFL-CIO) v. INS*, No. S-87-1064-JFM (E.D. Cal. filed July 22, 1987), all SAW denials in the INS' Northern and Western regions are to be re-examined to assure conformity with the procedures agreed upon by the petitioners and the plaintiffs there. These procedures are also to apply to all applications awaiting final processing. Obviously, the outcome of this case will not affect the terms of settlement in the *United Farm Workers* case. Only one SAW case remains pending which would be directly affected by this Court's decision. In *Ramirez-Fernandez v. Giugni*, No. EP-88-CA-389 (W.D. Tex., filed Nov. 25, 1988), plaintiffs brought a class action on behalf of SAW eligible aliens in Texas and New Mexico seeking injunctive and declaratory relief similar to that in *Haitian Refugee Center v. Nelson*. The district court denied plaintiffs' request for a preliminary injunction when the INS voluntarily agreed to extend the actions required under paragraphs (1), (2), (3) and (4) of the preliminary injunction issued in *HRC* to all SAW applications at the

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whose cases had been reopened pursuant to the district court's order and who have been subsequently furnished notices of adverse evidence, by affording them the opportunity for a second interview. As of December 6, 1989, this measure affects approximately 3,554 individuals within the Eleventh Circuit. It should be noted that the government took this step on its own volition and that such relief was not specifically required under the district court's order. Respondents are unaware as to whether any individuals have requested a second interview.

Dallas Regional Processing Facility which were filed in the thirteen state area of the Southern Region. Since, again, these measures have now been carried out, even were the INS to rescind its acceptance of the *HRC* standards throughout the Southern Region, review by this Court would have little practical effect.

B. While Petitioners Have Sought Review With Respect to General Federal Question Jurisdiction, Both the Present Case and Other IRCA-Related Cases Have Asserted Other Jurisdictional Grounds

In addition to federal question jurisdiction under 28 U.S.C. §1331, respondents' complaint also asserted jurisdiction under 8 U.S.C. §1329, which grants the district courts jurisdiction of all causes arising under Title II of the Immigration and Nationality Act, "notwithstanding any other law. . . ." Since the question presented by the instant petition is directed only at whether the district courts have general federal question jurisdiction, resolution of the question presented would not dispose of the underlying controversy.[25]

Petitioners cite five cases as examples of cases which would be impacted by the Court's decision on the issue presented in this case. Following the district court's decision in *Doe v. Nelson*, 703 F.Supp. 713, 720-722 (N.D. Ill. 1988), the INS issued a wire rescinding the regulation challenged in that case and reopening cases denied on the basis of that rule. The INS has not appealed the district court's ruling. Each of the four remaining cases cited by petitioner, as previously noted, is on appeal to the Ninth Circuit. In each of these cases, the complaint alleged other jurisdictional grounds beside the one challenged by petitioner here. Even were the

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[25] Petitioners suggest that whatever preclusive effect 8 U.S.C. §1160(e) has would apply equally to 8 U.S.C. §1329. However, it is not at all clear that the more specific grant of jurisdiction to the district courts in 8 U.S.C. §1329 would not require a heightened showing of Congressional intent before it could be overriden by 8 U.S.C. §1160(e). In any case, neither court below addressed the issue.

Court to rule that 8 U.S.C. §1160(a) precludes general federal question jurisdiction, that alone would not resolve these cases.[26]

C. This Court Should Not Grant Petitioners' Request for What Amounts to An Advisory Opinion.

Beyond its desire to obtain an advisory opinion on its jurisdictional theory, it is unclear why the government is even seeking review in this case, where it is not seriously contesting the merits of the lower courts' decisions and where, in any case, reversal is unlikely to affect the outcome of a *single* SAW determination. While this Court decides questions of public importance, "it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted). As the Special Agricultural Worker program winds down, the significance of the issues raised by Petitioner steadily diminishes. Adjustment to permanent resident status under the SAW program is basically automatic and therefore unlikely to generate the need for judicial review that prompted this case. No doubt the courts will continue to be confronted by difficult questions as to the interpretation of

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[26] Nor would granting certiorari in this case address some of the other concerns raised by the government such as its objections to extending the deadlines for aliens to apply for legalization in the *Catholic Social Services v. Thornburgh*, and *LULAC v. INS* cases. That issue is not before the Court in this case. Nor is this a case where a court has ordered detailed revision of the INS's rules. Although petitioner claims that "discovery and fact finding involving legalization issues have been particularly intrusive" the government chose not to seek review of the court of appeals' denial of the petition for mandamus challenging the district court's discovery order. While petitioner has characterized that order as compelling "the INS to produce in discovery up to 20,000 legalization files pertaining to the class members," to date, the only files which have been produced to the respondents are the 17 files relating to individual named plaintiffs. This discovery cannot be said to be either "intrusive" or "burdensome."

statutes which limit judicial review; however, questions regarding the proper interpretation of 8 U.S.C. §1160(e) are not likely to be among them. The circumstances which gave rise to this case are highly unlikely to recur and therefore further review by this Court is unwarranted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRA J. KURZBAN, ESQ.
KURZBAN, KURZBAN & WEINGER, P.A.
Plaza 2650
2650 Southwest 27th Avenue
Miami, Florida 33133
(305) 444-0060

Counsel of Record

COUNSEL:

ROBERT A. WILLIAMS, ESQ.
FLORIDA RURAL LEGAL SERVICES, INC.
110 South Second Street
Immokalee, Florida 33934
(813) 657-3681

CHERYL A. E. LITTLE, ESQ.
HAITIAN REFUGEE CENTER, INC.
32 N.E. 54th Street
Miami, Florida 33137
(305) 757-8538

BRUCE J. WINICK, ESQ.
UNIVERSITY OF MIAMI SCHOOL OF LAW
P.O. Box 248087
Coral Gables, Florida 33124